

FAIR EMPLOYMENT & HOUSING COUNCIL
Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 3. Discrimination in Housing

As it relates to housing, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed regulation and the reason it is necessary are described below. The problem that a particular proposed regulation addresses and the intended benefits are outlined under each subdivision, as applicable.

Subchapter 2. Discrimination in Employment

Article 1. General Matters

§ 11098.1

[Reserved]

§ 11098.2

[Reserved]

§ 11098.3, Definitions

The purpose of this section is to give meaning to terms used throughout the “Discrimination in Housing” subchapter of the FEHA regulations.

§ 11098.3, subd. (a) “Aggrieved Person”

The Council proposes to add the definition of “aggrieved person.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

§ 11098.3, subd. (b) “Housing Accommodation” or “Dwelling”

The Council proposes to add the definition of “Housing accommodation” or “dwelling.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide definitions mid-sentence. In this instance, Government code section 12927, subd. (d), provides a brief definition for “housing accommodation,” but for the sake of clarity and thoroughness, enumerating the vast array of what may constitute a “housing accommodation” or “dwelling” is important to effectuate the great scope of the term.

§ 11098.3, subd. (c) “Housing Provider”

The Council proposes to add the definition of “housing provider.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide a definition mid-sentence. Because the term is often used colloquially and in case law, it is more efficient to codify it and use terms that are used in practice rather than sticking to “person” or “owner” which, contrary to their actual definitions, may sound limiting.

§ 11098.3, subd. (d) “Owner”

The Council proposes to add the definition of “owner.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide a definition mid-sentence. While the definition of “owner” is contained in Government code section 12927, subd. (e), and closely matches the proposed regulatory definition, it is important to add trustees and receivers to the definition since they frequently are the “owners” of a housing accommodation and are mentioned in case law and complaints filed with the Department of Fair Employment and Housing (DFEH).

§ 11098.3, subd. (e) “Person”

The Council proposes to add the definition of “person.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide a definition mid-sentence. While the definition of “person” is contained in Government code section 12927, subd. (f), and closely matches the proposed regulatory definition, it is important to add “housing provider” to the definition of “person” in order to enable the interchangeable use of “person” or “housing provider” without inadvertently excluding any entity.

§ 11098.3, subd. (f) “Practice”

The Council proposes to add the definition of “practice.” This addition is necessary to incorporate the U.S. Department of Housing and Urban Development’s (HUD) usage of “practice” and to emphasize that an act of omission may constitute a “practice.” HUD’s regulations begin at 24 C.F.R. § 100.1.

§ 11098.3, subd. (g) “Protected Bases” or “Protected Classes”

The Council proposes to add the definition of “protected bases” or “protected classes.” This addition is necessary because it would otherwise be cumbersome and unclear to always state “race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of any person.” Because those characteristics are often referred to colloquially and in case law as “protected bases” or “protected classes,” it is more efficient to codify the terms rather

than repeatedly restate all of the characteristics.

§ 11098.4, Liability for Discriminatory Housing Practices

The purpose of this section is to describe the two main types of liability for discriminatory housing practices – direct and vicarious – and when each is invoked.

§ 11098.4, subd. (a) Direct Liability

The Council proposes to add the same direct liability formulation as HUD in its regulations entitled *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act* (80 Fed.Reg. 63720; Oct. 21, 2015). Because the federal rule is clear and accurately reflects California law, reiterating the federal rule is necessary to maintain consistency between the parallel federal Fair Housing Act (FHA) and the FEHA. Government Code section 12955.6 reads in parts “[n]othing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the Council has used the federal rule for consistency.

§ 11098.4, subd. (b) Vicarious Liability

The Council proposes to begin this subdivision with the same vicarious liability formulation as HUD and further elaborate with common law principles, some of which are articulated in HUD’s November 17, 2008, memo with the subject “Questions and Answers on Sexual Harassment under the Fair Housing Act.” As with the previous rule for direct liability, this is necessary to accurately state established principles and harmonize California law with its federal analog.

§ 11098.4, subd. (c) Knowledge of a Discriminatory Housing Practice or Failure to Take Appropriate Corrective Action

The Council proposes to clarify that liability is determined independent of one’s knowledge of a discriminatory housing practice or failure to take appropriate corrective action. This clarification is necessary to emphasize the recognized principle that ignorance is not a defense to an allegation of a discriminatory housing practice.

Article 2. Harassment and Retaliation

§ 11098.5, Harassment

The purpose of this section is to proscribe harassment, describe the two main types of harassment, and provide examples of what constitutes harassment.

§ 11098.5, subd. (a) Quid Pro Quo and Hostile Environment Harassment

The Council proposes to add an introductory paragraph and use the same quid pro quo harassment and hostile environment harassment formulation as HUD in its forthcoming regulations. Because the federal rule is clear and accurately reflects California law, reiterating the federal rule is necessary to maintain consistency between the federal FHA and the FEHA, which are parallel. Government Code section 12955.6 reads in parts “[n]othing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the Council used the federal rule for consistency. The one exception where the Council did not follow HUD is omitting the provision relating to the Title VII

affirmative defense. This is necessary because California law is more protective than federal law and has a strict liability standard for harassment by a supervisor, so reiterating the inapplicability of the Title VII affirmative defense would be confusing in the FEHA context.

§ 11098.5, subd. (b) Examples of Harassment

The Council proposes to add a non-exhaustive list of examples of harassment. This is necessary to clarify and flesh out the technical aspects of what constitutes harassment from the previous paragraph. The first four examples – verbal harassment, physical harassment, visual forms of harassment and unwelcome sexual conduct – are drawn from one of the Council’s fair employment regulations regarding harassment (Cal. Code Regs., tit. 2, § 11019) and are equally applicable in the housing context. The other examples are drawn from the Councilmembers’ practical experience, DFEH complaints, and case law and are particularly salient in the housing context.

§ 11098.6, Retaliation

The purpose of this section is to describe the standard for retaliation in housing and to define the terms used in that standard.

§ 11098.6, subd. (a) Standard for Retaliation

The Council proposes to state the general rule prohibiting retaliation in a succinct manner. This is necessary to clarify and effectuate Government Code section 12955, subd. (f), which reads “[it shall be unlawful for] any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner’s dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.” Since the FEHA statute contains its own standard for retaliation, the Council must follow it, though federal guidance has been similar. In the HUD memo with the subject “Questions and Answers on Sexual Harassment under the Fair Housing Act,” HUD similarly explains that “[r]etaliation includes, but is not limited to, denying housing, increasing rent, withholding maintenance or similar services, harassing, suing, and evicting, because a person exercised her legal rights under the Fair Housing Act.”

§ 11098.6, subd. (b) “Adverse Action”

The Council proposes to add the definition of “adverse action.” This addition is necessary to clarify a term used in the general prohibition on retaliation. Like the FEHA statute, the Council includes harassment and eviction as potential adverse actions. The Council further proposes to include a change in the terms and conditions in the definition because it is a common type of retaliation in the case law and often alleged by complainants in DFEH complaints.

§ 11098.6, subd. (c) “Protected Activity”

The Council proposes to add the definition of “protected activity.” This addition is necessary to clarify a term used in the general prohibition on retaliation. Like the FEHA statute, the Council includes (1) opposition of practices made unlawful under the FEHA, (2) informing law enforcement agencies of practices believed unlawful under the FEHA, (3) testifying or assisting in a proceeding regarding unlawful activity, and (4) aiding or encouraging a person to exercise their rights under the FEHA as examples of protected activities. The Council further proposes to include the assertion of rights protected by the FEHA and also making a request for a reasonable

accommodation in the definition because it is a common protected activity in the case law and often a central component of DFEH complaints.

§ 11098.6, subd. (d) “Dominant Purpose”

The Council proposes to add the definition of “dominant purpose.” This addition is necessary to clarify a term used in the general prohibition on retaliation. “Dominant purpose” does not have an analog in federal law, is not conceptualized in statute or case law, and is not mentioned in the FEHA or its predecessors’ legislative history. Therefore, the Council analogized to the employment standard – substantial motivating factor – that comes from *Harris v. City of Santa Monica*, 56 Cal.4th 203 (2013) and was reiterated and adopted in the Council’s fair employment regulations at Cal. Code Regs., tit. 2, § 11009.

Article 3.

[Reserved]

Article 4. Disability

§ 11098.23, Definitions

The purpose of this section is to define terms used in this article relating to discrimination in housing based on disability. This section is brief because most terms that need to be defined are general terms that are applicable to all articles and defined in proposed section 11098.3.

§ 11098.23, subd. (a) “Assistive Animal”

The Council proposes to add the definition of “assistive animal” and its constituent parts by using the same formulations, with slight modifications for the sake of clarity, found in the Council’s fair employment regulations at Cal. Code Regs., tit. 2, § 11065. This addition is necessary because to interpret claims of housing discrimination, both federal and state courts look to employment discrimination precedent. California courts have held that the basic principles of employment discrimination can be applied in the housing context. *Brown v. Smith*, 55 Cal. App. 4th 767, 782 (1997) (noting that basic principles of sexual harassment in employment cases are applicable in the housing context); *Auburn Woods I Homeowners Ass’n v. Fair Employment and Hous. Comm’n*, 121 Cal. App. 4th 1578, 1591 (2004) (“[P]rinciples at issue in cases of employment discrimination are often applied in housing discrimination cases.”). Moreover, the Council proposes to clarify and reiterate the established fact that assistive animals are not pets. This is necessary to disabuse the notion that assistive animals are pets.

§ 11098.26, Reasonable Accommodations

The purpose of this section is to describe housing providers’ duty to reasonably accommodate a person with a disability, give examples, and explain when a housing provider may deny a requested accommodation

§ 11098.26, subd. (a) Affirmative Duty to Make Reasonable Accommodations to Afford Equal Opportunity

The Council proposes to add the standard for when a housing provider must make a reasonable accommodation and to provide examples. The standard is necessary to provide guidance to housing providers, especially because there is a paucity of case law and other guidance, including the FEHA itself, on the topic. This standard is derived from *Auburn Woods I*

Homeowners Ass'n v. Fair Employment and Housing Com'n, 121 Cal.App.4th 1578 (2004), which discusses the rule. Moreover, the examples are necessary to flesh out the rule. The first two examples are come from the HUD regulations at 24 C.F.R. § 100.204(b) because the federal rule is clear and accurately reflects California law. The Council proposes to include the third example to clarify a common misconception amongst some housing providers about an arrangement that the DFEH frequently sees in investigating cases.

§ 11098.26, subd. (b) When a Request for a Reasonable Accommodation May Be Denied

The Council proposes to add the three situations when a reasonable accommodation may be denied. This is necessary to concisely clarify and consolidate a disparate body of law into one regulation. The law tracks the FHA as it was articulated in the “Joint Statement of the Department of Housing and Urban Development and the Department of Justice [about] Reasonable Accommodations under the Fair Housing Act” (Joint Statement) (May 14, 2004, available at <https://www.justice.gov/crt/us-department-housing-and-urban-development>).

§ 11098.27, Assistive Animals as a Reasonable Accommodation

The purpose of this section is to elaborate upon the previous section’s general rules on reasonable accommodation as it relates to a common accommodation – assistive animals.

§ 11098.27, subd. (a) When a Request for an Assistive Animal May Be Denied

The Council proposes to enumerate the circumstances limited to assistive animals in which a housing provider may deny a request for reasonable accommodation. This is necessary to elaborate upon the three reasons housing providers may deny a requested accommodation that are enumerated in the previous proposed section. Because assistive animals pose unique conditions not found with other reasonable accommodations, the Council’s proposal concisely accounts for three additional reasons to deny that request for accommodation. Those reasons are largely drawn from HUD’s April 25, 2014, guidance with the subject “Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs.”

§ 11098.27, subd. (b) Pet Fees and Damages

The Council proposes to clarify that a housing provider may not charge a pet fee to a person who is granted accommodation for an assistive animal, but may charge for damage that the animal causes. This is necessary to clarify a misconception amongst some housing providers that they may charge a person with a disability for their accommodation and is reiterated in HUD’s memo regarding service animals and assistance animals. The clarification about charging for damage the animal may cause is necessary to clarify that the common law principle whereby tenants pay for damages, excluding reasonable wear and tear, is still applicable and not superseded in the disability content.

§ 11098.27, subd. (c) State and Local Requirements Regarding Animals Are Equally Applicable to Assistive Animals

The Council proposes to clarify that any state and local requirements regarding animals apply equally to assistive animals and that a housing provider is permitted to request verification that an assistive animal is in compliance with any applicable requirements. This is necessary to emphasize that, just as in the landlord/tenant context involving damages, the request for and granting of an assistive animal as a reasonable accommodation does not supersede any other law.

§ 11098.27, subd. (d) Reasonable Conditions on an Assistive Animal to Ensure Control

The Council proposes to clarify that a housing provider may impose other reasonable conditions,

so long as they are not more restrictive than those imposed upon other animals, on an assistive animal to ensure it is under the control of the applicant or resident. As with potential damage caused by the assistive animal, this rule is necessary to reiterate both that housing providers may not single out individuals with disabilities for disparate treatment and that generally applicable, reasonable rules regarding control of animals are also applicable to individuals with disabilities.

§ 11098.27, subd. (e) Invitees Shall Be Granted Accommodation for Assistive Animals

The Council proposes to clarify that invitees shall be granted accommodation for assistive animals, in accordance with any restrictions. This is necessary to affirm that, since a housing accommodation may be a place of public accommodation and owners are allowed to have guests, the rules applicable to owners are applicable to invitees. It would otherwise frustrate the purpose of the FEHA to limit an accommodation to only those with an equitable right of ownership or possession or the right to rent or lease housing accommodations.

§ 11098.27, subd. (f) Verification of Disability

The Council proposes to state that a housing provider may require verification of a disability, even when the disability is known but the disability-related need for the assistive animal is not. This is necessary to clarify the interrelatedness of the regulations in the disability article, state clear rules on when a housing provider may in good faith verify a disability, and provide guidance regarding requests for an animal as a disability accommodation.

§ 11098.27, subd. (g) Qualified Health Care Provider’s Specific Knowledge of the Patient’s Medical Condition

The Council proposes to prescribe that a “qualified health care provider...must have specific knowledge of the patient’s medical condition based on an individualized examination and not operate primarily to provide certifications for assistive animals... If medical information is provided by a qualified health care provider who does not have specific knowledge based on an individualized examination and operates primarily to provide certifications for assistive animals, then the housing provider may request information verifying the need for an accommodation from a qualified health care provider and continue to engage in the interactive process.” This is necessary to clarify the interrelatedness of the regulations in the disability article, state clear rules about whose opinion is needed to verify a disability, and provide guidance regarding requests for an animal as a disability accommodation.. Because certain services exist solely to certify the need for an assistive animal, the Council seeks to restore the legitimacy to the request and ultimate approval of an assistive animal as a reasonable accommodation and institute a narrowly-tailored rule to thwart bad actors rather than more broadly restricting the lawfulness of assistive animals.

§ 11098.28, Undue Hardship and Fundamental Alteration

The purpose of this section is to outline undue hardship, whereby a housing provider may deny a request for accommodation as not reasonable.

§ 11098.28, subd. (a) and (b) Undue Hardship as Significant Difficulty or Fundamental Alteration and Factors to Consider

The Council proposes to summarize and codify the undue hardship guidance found in the Joint Statement. This is necessary to accurately state established principles, harmonize California law with its federal analog, and prevent the Council from needlessly devising a new statement of an

old doctrine.

§ 11098.29, The Interactive Process

The purpose of this section is to outline a housing provider’s obligation to engage in an interactive process to find a reasonable accommodation and what that entails.

§ 11098.29, subd. (a)-(f) Specifics of the Interactive Process

The Council proposes to state the general standard explaining the need to engage in an interactive process and how to implement this. This is a similar formulation, with modifications for the sake of clarity and to account for the particulars of the housing context, found in the Council’s fair employment regulations at Cal. Code Regs., tit. 2, § 11069. It is also derived from the Joint Statement. This addition is necessary to describe how to entertain a request for accommodation and because to interpret claims of housing discrimination, both federal and state courts look to employment discrimination precedent. California courts have held that the basic principles of employment discrimination can be applied in the housing context. *Brown v. Smith*, 55 Cal. App. 4th 767, 782 (1997) (noting that basic principles of sexual harassment in employment cases are applicable in the housing context); *Auburn Woods I Homeowners Ass’n v. Fair Employment and Hous. Comm’n*, 121 Cal. App. 4th 1578, 1591 (2004) (“[P]rinciples at issue in cases of employment discrimination are often applied in housing discrimination cases.”).

§ 11098.30, Proof of Disability

The purpose of this section is to outline when a housing provider may request proof of disability in connection with the interactive process and reasonable accommodations, how that request must be made, what must be provided, and who qualifies as a “qualified health care provider.”

§ 11098.30, subd. (a)-(e) Specifics of Proof of Disability

The Council proposes to add “if the need for the requested accommodation or modification is not readily apparent, the housing provider may request that the applicant or resident provide documentation from a qualified health care provider verifying that an accommodation or modification is necessary because the person has a disability and because the request for accommodation or modification would afford the person with a disability equal opportunity to use and enjoy a dwelling.” The Council further proposes to clarify that the information must be confidential, that the proof of disability must identify the specific species of animal if applicable, and who is a “qualified health care provider.” This section is similar, with modifications for the sake of clarity and to account for the particulars of the housing context, to that found in the Council’s fair employment regulations at Cal. Code Regs., tit. 2, § 11069. It is also derived from the Joint Statement. This addition is necessary to provide reassurance to housing providers and prevent fraud by ensuring that a requested accommodation is reasonable, narrowly tailored to a disability, and validated appropriately. And as before, the regulation is also necessary because to interpret claims of housing discrimination, both federal and state courts look to employment discrimination precedent.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or

documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments clarify existing law without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, tenants, housing providers, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

Based on the analysis above regarding evidence supporting finding of NO significant statewide adverse economic impact directly affecting business:

The Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs or housing within the state; the creation of new businesses or housing or the elimination of existing businesses or housing within the state; the expansion of businesses or housing currently doing business within the state; or worker safety and the environment. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.